

(2002) 03 AP CK 0047

In the Andhra Pradesh High Court

Case No : Writ Petition No. 18860 of 2001

Sunrise Industries

APPELLANT

Vs

Subhadra Engineering Works, Mechanical Engineers, Iron and
Brass Foundries, Howrah

RESPONDENT

Date of Decision : 27-03-2002

Acts Referred:

Arbitration and Conciliation Act, 1996 — Section 11

Citation : (2002) 3 ALD 24 : (2002) 3 ALT 296

Hon'ble Judges : Ar. Lakshmanan, C.J;I. Venkatanarayana, J

Bench : Division Bench

Advocate : Pratap Narayan Sanghi, for the Appellant;

Final Decision : Allowed

Judgement

Ar. Lakshmanan, C.J.—This writ petition has been filed to quash the judgment dated 14-8-2001 passed by a learned single Judge of this Court in Arbitration Application No.47 of 2001 and consequently to appoint a sole arbitrator to resolve the dispute between the parties arising out of the contract of supply, installation and trial run of the machinery by respondent-company at the factory premises of the petitioner vide quotation reference No.SEW/275/98-99, dated 17-2-1999.

2. Rule nisi was issued by this Court on 12-9-2001. When the matter was called on 18-10-2001 nobody appeared for the respondent despite service of notice; however, the case was adjourned to enable the office to verify as to whether anybody has filed vakalat for the respondent. On 30-10-2001 the matter was listed and at the request of the learned Counsel for the petitioner, it was adjourned. Again, on 1-2-2002, the case was listed and it underwent adjournment to 12-2-2002. On 12-2-2002, the matter was heard in part and it was directed to be listed after ten days to place before this Court the decision of the apex Court in Konkan Railway Corporation Ltd. v. Rani Construction (P) Ltd. 2002 (2) ALD 14 (SC), which affirmed the earlier decision of the Supreme Court

in Konkan Railway Corpn. Ltd. and Others Vs. M/s. Mehul Construction Co., .

3. The petitioner filed AA No.47 of 2001 u/s 11(6) of the Arbitration and Conciliation Act, 1996 (hereinafter called "the Act") seeking directions to appoint an arbitrator to resolve the dispute between the parties arising out of the contract of supply, installation and trial run of the machinery by respondent at its factory premises, vide quotation in Reference No.SEW/275/98-99, dated 17-2-1999. A learned single Judge of this Court heard the said application and by his order dated 14-8-2001 dismissed the same as not maintainable in this Court by observing as follows :

"The learned Counsel argued accepting the conditions stipulated in the offer document the applicant entered into an agreement with the respondent and therefore, the respondent is bound by the arbitration clause. In view of the fact that there is a dispute between the parties the respondent is under legal obligation to refer the matter for arbitration.

I see substance in the submission made by the learned Counsel in this regard but the question is whether the present application is maintainable in this Court. Under the scheme of Arbitration Act an application u/s 11 is required to be made to the Chief Justice or any person nominated by the Chief Justice. The expression Chief Justice itself is explained u/s 11(12)(b) in the following words :

"Whether the matters referred to in Subsections (4), (5), (6), (7), (8) and (10) arise in any other arbitration, the reference to "Chief Justice" in those subsections shall be construed as a reference to the Chief Justice of the High Court within whose local limits the principal civil Court referred to in Clause (e) of Sub-section (1) of Section 2 is situate and, where the High Court itself is the Court referred to in that clause, to the Chief Justice of that High Court."

In substance, the section opines that the Chief Justice referred to Section 11 is the Chief Justice within those territorial jurisdiction a suit regarding the subject-matter of the dispute would lay if the disputes were to be settled by way of a suit. Admittedly, in this case, the transaction took place in part within the jurisdiction of the Calcutta High Court and partly within the jurisdiction of this Court. Without going into the details as to where exactly the cause of action for the present dispute arose and accepting the submission that the cause of action in part arose within the territorial jurisdiction of this Court. Clause II of the Conditions of offer document is relevant which stipulates the transaction is subject to Howrah jurisdiction. It is a settled position of law that where more than one Court has the jurisdiction, which admittedly as per the applicant is the case herein, the parties are at liberty to make a choice of such jurisdiction. The offer document stipulates the condition that the litigation would be subject to Howrah jurisdiction and the applicant admitted this condition and proceeded with the transaction.

In the circumstances, I am of the opinion that the application is not maintainable in this Court and the same is dismissed."

4. Aggrieved by the said order, the present writ petition has been filed with the aforementioned prayer.

5. When the case came up before us on the last occasion, we directed the learned Counsel for the petitioner to advance arguments on the question of maintainability of the writ petition. Accordingly, the learned Counsel for the petitioner placed reliance on the judgment of the Supreme Court reported in R.S.D.V. Finance Co. Pvt. Ltd. Vs. Shree Vallabh Glass Works Ltd., . Before referring to the above judgment, it is useful to refer to certain relevant factors in order to appreciate the arguments advanced by the learned Counsel for the petitioner.

6. The respondent-company, which claims to be specialised in the manufacturing of machinery to crush tamarind seeds, coconut shell etc., is having its registered office at Howrah. The petitioner deals in tamarind seed powder, coconut shell powder and its incidentals and pulverises. The petitioner called for quotation for purchasing the machinery and the respondent submitted its quotation dated 17-2-1999 on the overleaf of which, terms and conditions of the sale were mentioned. The respondent-company assured the petitioner that the machinery, which was required to be supplied for its industry, is capable of crushing 450 Kgs., per hour tamarind seeds powder and 1000 Kgs., per hour coconut shell powder and apart from that the respondent also promised to deliver and install the machinery at the petitioner's premises by the end of June, 1999 and a trial run will be given thereafter. On the said commitment made by the respondent, the petitioner placed the order and also paid the complete money in advance. But, contrary to the terms and conditions, the machinery was installed by the respondent at Visakhapatnam only in February, 2000 with a delay of 8 months. It is stated in the affidavit filed in support of the writ petition that contrary to the commitment even the result of production capacity was also very poor. Therefore, the petitioner issued a legal notice on 9-11-2000 invoking the provisions of contract as mentioned in the overleaf of the quotation contending that since the capacity of the machinery is very poor apart from the delay in the delivery of the machinery, the matter be referred for arbitration. The said legal notice was served on the respondent, but there was no response. A second communication dated 24-1-2001 referring the name of a sole arbitration was also issued, which was also served on the respondent-company, but there was no response from the respondent even to this second communication. Then the petitioner moved this Court for appointment of arbitrator u/s 11(6) of the Act by the said Arbitration Application No.47 of 2001. In this context, it is useful to refer Clause 11 of the Conditions of Sale, which reads as follows:

"Transactions subject to Howrah jurisdiction."

7. The learned single Judge basing on the said clause rejected the application u/s 11(6) of the Act on the question of maintainability of the application in this Court. According to the learned Judge, since the offer document stipulates the condition that the litigation would be subject to Howrah jurisdiction and the

petitioner admitted this condition and proceeded with the transaction, this Court has no jurisdiction to entertain the application u/s 11(6) of the Act. In our opinion, the view taken by the learned single Judge, with respect, is not correct.

8. We have perused Clause 11 of the Conditions of Sale, which contemplates that the transaction is subject to Howrah jurisdiction. In this context, it is useful to refer to paragraph 9 of the decision of the apex Court in R.S.D.V. Finance Co., Pvt., Ltd. case (supra), which is reproduced hereunder:

"9. We may also consider the effect of the endorsement "Subject to Anand jurisdiction" made on the deposit receipt issued by the defendant. In the facts and circumstances of this case it cannot be disputed that the cause of action had arisen at Bombay as the amount of Rs.10,00,000/- itself was paid through a cheque of the bank at Bombay and the same was deposited in the bank account of the defendant in the Bank of Baroda at Nariman Point, Bombay. The five post-dated cheques were also issued by the defendant being payable to the plaintiff at Bombay. The endorsement "Subject to Anand jurisdiction" has been made unilaterally by the defendant while issuing the deposit receipt. The endorsement "Subject to Anand jurisdiction" does not contain the ouster clause using the words like "alone", "only", "exclusive" and the like. Thus the maxim "expressio unius est exclusio alterius" cannot be applied under the facts and circumstances of the case and it cannot be held that merely because the deposit receipt contained the endorsement "Subject to Anand jurisdiction" it excluded the jurisdiction of all other Courts who were otherwise competent to entertain the suit. The view taken by us finds support from a decision of this Court in A.B.C. Laminart Pvt., Ltd v. A.P. Agencies, Salem""

9. In the instant case, the endorsement "transaction subject to Howrah jurisdiction" has been made by the respondent unilaterally while issuing the quotation. The said endorsement does not contain the ouster clause using the words like "alone", "exclusion", "only", etc. The apex Court in R.S.D.V. Finance Company Private Limited case (supra), was of the opinion that the maxim "expressio unius est exclusio alterius" cannot be applied in the facts and circumstances of the case and it cannot be held that merely because the deposit receipt contains the endorsement "subject to Anand jurisdiction" it excluded the jurisdiction of all other Courts, which were otherwise competent to entertain the suit. In our opinion, the above Supreme Court decision directly applies to the facts of the present case.

10. It is also seen from the records that the quotation was sent by the respondent-company to Visakhapatnam. The machinery I was installed by the respondent at Visakhapatnam, the trial was conducted by the respondent at Visakhapatnam and the amount was paid and received by the respondent-company at Visakhapatnam. Hence, as contended by the learned Counsel for the petitioner, almost the complete transaction took place only at Visakhapatnam except the machinery was sent from Kolkata. Thus, in our opinion, the cause of action arose only at Visakhapatnam, which is within the absolute territorial

jurisdiction of this Court. A perusal of the order of the learned single Judge would also show that the learned Judge while acknowledging that a part of the cause of action took place within the jurisdiction of this Court, but refused to entertain the application in view of Clause 11 of the Conditions of Sale. In our opinion, the view taken by the learned single Judge is contrary to the settled proposition of law declared by the apex Court in R.S.D.V. Finance Co., Pvt., Ltd case (supra). Thus, we hold that this Court has got jurisdiction to entertain the application u/s 11(6) of the Act.

11. Next, we refer to the decision of the apex Court reported in Konkan Railway Corporation Limited v. Mehul Construction Company (supra). This decision was cited by the learned Counsel for the petitioner to a query put by the Bench with regard to the maintainability of the writ petition against the order passed by the learned single Judge. The Supreme Court, in the above case, held that even an order refusing to appoint an arbitrator would not be amenable to the jurisdiction of the Supreme Court under Article 138 of the Constitution of India. The Supreme Court further held that, however, that an order refusing to appoint an arbitrator after going into and deciding contentious issues would be an act of non-performance of duty and so the authority which made the order could be directed by a writ of mandamus to perform its duty. In the instant case, the learned single Judge of this Court entertained the contentious issues and after elaborate consideration of the matter had found that this Court has not jurisdiction to entertain the application and dismissed the same as not maintainable. In the above case, the apex Court has considered the nature of the functions performed by the Chief Justice or his nominee in paragraph 6 of its judgment, which is reproduced hereunder:

"6. The nature of the function performed by the Chief Justice being essentially to aid the constitution of the Arbitration Tribunal immediately and the Legislature having consciously chosen to confer the power on the Chief Justice and not a Court, it is apparent that the order passed by the Chief Justice or his nominee is an administrative order, as has been held by this Court in Ador Samia's case and the observations of this Court in Sundaram Finance Ltd., case also are quite appropriate and neither of those decisions require any reconsideration. This being the position even an order refusing to appoint an arbitrator will not be amenable to the jurisdiction of this Court under Article 136 of the Constitution. Needless to mention such an order refusing to appoint an arbitrator after deciding the contentious issues would be an act of non-performance of duty and in view of what has been stated earlier, the concerned authority could be directed by mandamus to perform its duty."

12. Applying the said principles laid down by the Honourable Supreme Court, we are of the opinion that an order passed by the learned single Judge refusing to entertain the application u/s 11(6) of the Act seeking an order of appointment of arbitrator would be an act of non-performance of duty as observed by the Supreme Court in the above decision.

13. The decision of the 3-Judges Bench of the Supreme Court in Mehul Construction Co. case (supra) affirmed the view taken in Ador Samia Private Limited Vs. Peekay Holdings Limited and Others, , that the order of the Chief Justice or his designate in exercise of the powers u/s 11(6) of the Act was an administrative order and that such an order was not amenable to the jurisdiction of the Supreme Court under Article 136 of the Constitution of India. Thereafter, in M/s. Konkan Railway Corpn. Ltd. and Another Vs. M/s. Rani Construction Pvt. Ltd., , a Bench of two learned Judges referred the matter to a Larger Bench the decision of three learned Judges in Mehul Construction Company case (supra) for reconsideration. A Larger Bench of five Honourable Judges of the Supreme Court answered the reference in Konkan Railway Corporation Ltd case (supra). It is useful to refer paragraphs 22, 24 and 26 of the said judgment, which are reproduced hereunder:

"22. To put it concisely, for an order property to be the subject of a petition for special leave to appeal under Article 136, it must be an adjudicatory order, an order that adjudicates upon the rival contentions of the parties, and it must be passed by an authority constituted by the State by law for the purpose in discharge of the State's obligation to secure justice to its people.

24. There is nothing in Section 11 that requires the party other than the party making the request to be noticed. It does not contemplate a response from that other party. It does not contemplate a decision by the Chief Justice or his designate on any controversy that the other party may raise, even in regard to its failure to appoint an arbitrator within the period of thirty days. That the Chief Justice or his designate has to make the nomination of an arbitrator only if the period of thirty days is over does not lead to the conclusion that the decision to nominate is adjudicatory. In its request to the Chief Justice to make the appointment, the party would aver that this period has passed, and, ordinarily, correspondence between the parties would be annexed to bear this out. This is all that the Chief Justice or his designate has to take into account the qualifications required of the arbitrator by the agreement between the parties (which, ordinarily, would also be annexed to the request) and other considerations likely to secure the nomination of an independent and impartial arbitrator also cannot lead to the conclusion that the Chief Justice or his designate is required to perform an adjudicatory function. That the word "decision" is used in the matter of the request by a party to nominate an arbitrator does not of itself mean that an adjudicatory decision is contemplated.

26. It might be that though the Chief Justice or his designate might have taken all due care to nominate an independent and impartial arbitrator, a party in a given case may have justifiable doubts about that arbitrator's independence or impartiality. In that event, it would be open to that party to challenge the arbitrator u/s 12, adopting the procedure u/s 13. There is no reason whatever to conclude that the grounds for challenging u/s 13 are not available only because the arbitration has been nominated by the Chief Justice or his designate u/s 11."

14. The Supreme Court in the said decision held that the order of the Chief Justice or his designate u/s 11 of the Act nominating an arbitrator is not an adjudicatory order and the Chief Justice or his designate is not a Tribunal and that such an order cannot properly be made the subject of a petition for special leave to appeal under Article 136 of the Constitution of India. Thus, the 5 Judges of the Supreme Court affirmed the decision of the 3 Judges Bench in Mehul Construction Company case (supra).

15. The arbitration clause as mentioned in the Conditions of Sale reads as follows :

"Any dispute or controversy that may arise in connection with the contract shall be settled amicable between the parties.

In case amicable settlement cannot be reached, the dispute shall be settled by means of arbitration, the arbitrator being agreeable to both the parties. The decision of arbitrator will be binding on the parties. Such arbitration would be conducted in accordance with the provisions of the Arbitration Act, 1940 or statutory modification or enactment of the rules made thereunder and the time being in force shall apply to the arbitration proceedings under this clause."

16. In the instant case, the petitioner has issued a notice through his Counsel on 9-11-2000 while invoking the said arbitration clause, which is on the reverse of the quotation and requested the respondent for appointment of an arbitrator from his side within 15 days from the date of receipt of the notice after which, the petitioner would also nominate an arbitrator from his side for settlement of the disputes. Since there was no response from the respondent, the petitioner again issued another legal notice on 24-1-2001 through his advocate to the respondent nominating one Sri L. Apparao, retired District Judge, Grade I, Plot No.8, Door No.39-6-80, Muralinagar, Visakhapatnam as the arbitrator to arbitrate the dispute. By this notice, the respondent was called upon to concur on the appointment of the arbitrator as indicated in the notice within the statutory period of 30 days from the date of receipt of the notice. Since there was no response from the respondent to the said second notice also, the petitioner was compelled to approach this Court u/s 11(6) of the Act. As there was no opposition from the respondent's side, we approve the appointment of Sri L. Apparao, retired District Judge as the sole arbitrator to decide the dispute indicated in the legal notice dated 9-11-2000 of the petitioner and proceed further in accordance with the provisions of the Act.

17. Accordingly, the writ petition is allowed and the impugned order of the learned single Judge is modified to the extent indicated above. No order as to costs.